

February 1, 2010

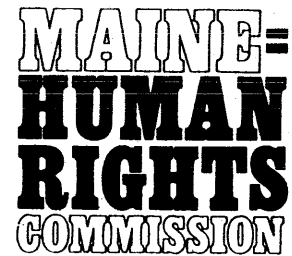
Barbara Hustus (Glenburn)

v.

State of Maine, Department of Health and Human Services (Bangor)

and

Janel Cadman



51 STATE HOUSE STATION
AUGUSTA, ME 04333-0051
www.maine.gov/mhrc

Executive Director
PATRICIA E. RYAN

Commission Counsel
JOHN P. GAUSE

I. COMPLAINANT'S CHARGE:

Complainant, Barbara Hustus, alleged that Respondents, State of Maine, Department of Health and Human Services, and Janel Cadman (caseworker) discriminated against her in a place of public accommodations by making derogatory comments about her race and ancestry.

II. RESPONDENT'S ANSWER:

Respondents, SOM/Department of Health and Human Services and Janel Cadman, denied the allegation of discrimination and said that they do not agree with the Complainant's characterization of the communications between the Complainant and Ms. Cadman.

III. JURISDICTIONAL DATA

- 1) Date of alleged discrimination: May 20, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: November 19, 2008.
- 3) Respondent, SOM/Department of Health and Human Services, is a public accommodations and is subject to the Maine Human Rights Act, as is discussed more fully in the Analysis section below. Respondent, Janel Cadman, is an "agent or employee of any place of public accommodation," 5 M.R.S.A. § 4592(1), and is subject to the Maine Human Rights Act. Ms. Cadman can also be held liable under the Act pursuant to the provision that prohibits aiding or abetting another to commit unlawful discrimination. *See* 5 M.R.S.A. § 4553(10)(D).

- 4) Respondents are represented by Susan Herman, Assistant Attorney General. Complainant is represented by Michael Guare, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties.

IV. DEVELOPMENT OF FACTS:

- 1) The parties and issues in this case are as follows:
 - a) The Complainant, Barbara Hustus, is Native American. She was being interviewed by Respondent due to a report of inappropriate language used with her children.²
 - b) The Respondent, State of Maine, Department of Health and Human Services (hereinafter referred to as DHHS), is a state agency charged with investigating allegations of child abuse and neglect. Respondent Janel Cadman, is a caseworker employed by DHHS who is alleged to have made the discriminatory comments to Complainant.
 - c) Supervisor refers to Ms. Cadman's supervisor who was present when the alleged comments were made.
 - d) Complainant alleges that discriminatory racial comments were made to her on May 20, 2008.
 - e) Respondents, SOM/Department of Health and Human Services and Janel Cadman, denied the allegation of discrimination and said that they do not agree with the Complainant's characterization of the communications between the Complainant and Ms. Cadman.
- 2) Complainant provides the following regarding how she believes she has been discriminated against due to her race and ancestry:
 - a) On or about May 20, 2008, Janel Cadman, a caseworker with DHHS came to her house and interviewed her about her children. Ms. Cadman said she had received two calls alleging that she had called her children inappropriate names. Ms. Cadman stated that since they already had an open case with her, they had to look into the new allegations.

² Respondents did not provide information as to the nature of their communications with Complainant as these allegations relate to matters which are confidential. Any information in this report that references the specific nature of the reason for DHHS' visit was provided by Complainant. Respondent provided information about the alleged comments but not about the reason for the home visit.

- b) She denied these allegations. She was trying to determine who would call DHHS about her and asked if it was the downstairs neighbors.
 - c) Ms. Cadman asked her why she would think it was the downstairs neighbors and Complainant told her it was because they can hear every little thing that goes on in her apartment and they are nosy. At that point Ms. Cadman made comments that she found to be racially discriminatory, including that "I have the understanding that you Natives don't rat on each other and that you guys lie for each other," and that "those people up there (on the Island³) cover up for each other all the time."
 - d) She told Ms. Cadman that these people were her tribe but she did not know anyone up there (on the island) as she was not raised there. Ms. Cadman accused her of lying and said she was born and raised on the island. She informed Ms. Cadman that she was raised by her grandparents and did not reside on the island.
 - e) Ms. Cadman's supervisor was nearby when the comments were made but she is unaware if Supervisor heard these comments. Ms. Cadman and the Complainant were outside the Complainant's residence when Ms. Cadman made the racially discriminatory comments described above. At the time, Supervisor was in her car talking to one of the Complainant's children. Complainant is not good at estimating distances but believes that Supervisor's car was approximately 10 feet from where Ms. Cadman and the Complainant were.
- 3) Complainant provided the following as evidence of the events outlined above:
- a) (Diary entry dated May 20, 2008) Complainant's twelve-page journal entry outlines the events of the day and how she was visited by DHHS officials. She details how Ms. Cadman stated, "... Well, I have the understanding that you Natives don't rat on each other and that you guys lie for each other." The journal entry goes on to state that when Complainant told Ms. Cadman she did not know other people Ms. Cadman referred to on the island, that Ms. Cadman stated, "I don't believe you. Those people there cover up for each other all the time."
 - b) (Letter from Complainant's former caseworker at a local mental health association whom Complainant spoke to about Ms. Cadman's alleged comments) This letter was written in support of Complainant's complaint with the Maine Human Rights Commission and verifies that Complainant did report to her during the time Complainant was her client, that her DHHS caseworker, Janel Cadman, had made a remark to Complainant

³ The "island" refers to Indian Island, part of the Penobscot Indian Nation's reservation land, located near Old Town.

about how "Native Americans all stick together." She does not recall the entire conversation but does recall that Ms. Hustus was upset by the comment and felt the comment was discriminatory.

4) Respondents respond to the above as follows:

- a) The Complainant did not raise her concerns about the alleged comments within the Department prior to the Department's receipt of the Charge of Discrimination from the Maine Human Rights Commission.
- b) Subsequent to the receipt of the Charge of Discrimination, a review of the incident was conducted. Ms. Cadman and the Complainant were interviewed by two of the Department's Equal Employment Opportunity Coordinator/Personnel Officers.
- c) Ms. Cadman's version of events, as told to the EEO Officers, is as follows:
 - i) Ms. Cadman did not say that Native Americans lie for each other and she did not call the Complainant a liar. Ms. Cadman and her supervisor visited the Complainant's apartment in response to a complaint. At that time, Complainant lived in a Native American housing unit.⁴
 - ii) The Complainant attempted to determine the source of the complaint to the Department. The Complainant named some of her neighbors and told Ms. Cadman that she had called the police on one of her neighbors. Ms. Cadman told the Complainant that if the allegations came from someone within the Complainant's housing unit, it was her understanding that Native American families look out for one another, stick together and do not "tell" on each other. Ms. Cadman asked the Complainant whether this was true.
 - iii) The Complainant then became emotional and asked if Ms. Cadman was asking her if Native Americans lie for each other. The Complainant then stated that Native Americans do not lie and that this is not about being a Native family.
 - iv) The Complainant interpreted Ms. Cadman's remark as suggesting that Native American's "lie" for each other. Ms. Cadman did not state that Native Americans "lie" for each other and did not intend her comment to be racially disparaging.

⁴ At the time of these events, Complainant was residing in a multi-unit dwelling which the Complainant believes was operated by Wabanaki Mental Health, a mental health agency which serves Native Americans. All residents in the building were Native Americans, to the best of Complainant's knowledge.

- d) Complainant did not allege that she was excluded from any service, program or activity because of the alleged comments.
 - e) Ms. Cadman remains a DHHS caseworker.
- 5) Respondent DHHS provides the following regarding training and education provided to employees regarding harassment and discriminatory comments:
- a) Training provided to employees and managers regarding harassment is conducted in accordance with 26 M.R.S.A. §807(3), to include definitions/description of sexual harassment, examples, prohibition of retaliation, how to make a complaint, and how to access the Maine Human Rights Commission. The training also includes examples of other types of harassment. In addition, DHHS implemented online harassment training for managers for refresher training. New employees and supervisors must attend training within six months of being hired, with a goal of three months at the most. Training is offered at least once a month for all employees and quarterly for managers and is conducted by one of the two DHHS EEO Coordinators. All employees must attend the training.

V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to “determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S.A. §4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The public accommodations provision of the MHRA provides, in relevant part, that it is unlawful public accommodations discrimination “[f]or any public accommodation or any person who is the . . . agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color . . . ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.” 5 M.R.S.A. § 4592(1).
- 3) As a preliminary matter, DHHS’ argument that the Maine Human Rights Act does not apply to it is rejected. The Act defines “place of public accommodation” to include “a facility, operated by a public or private entity, whose operations fall within at least one of the following categories: . . . service establishment . . . other establishment of the State. . . .” 5 M.R.S.A. § 4553(8)(F, M). DHHS meets this

definition because it maintains offices throughout the State and is an "service establishment" and an "establishment of the State."

- 4) DHHS' argument that the public accommodations provisions of the Act do not apply to client services is also rejected. Respondent cites *Jackson v. State of Maine*, 544 A.2d 291 (Me. 1988), which held that the former definition of "public accommodation" in the Act did not apply to driver's licensing decisions. That decision has been overruled by statute, however, in that the Act now explicitly applies to drivers' licensing decisions. See 5 M.R.S.A. § 4555. The definition of "public accommodation" has also been amended subsequent to the *Jackson* decision to be similar to the definition in the Americans with Disabilities Act, which has been interpreted by the First Circuit Court of Appeals to cover services offered outside of a physical structure. See *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.* 37 F.3d at 18-20 (health benefit plan).
- 5) The MHRA does not explicitly address claims of harassment by a place of public accommodation. In the employment context, the MHRA, following federal law, has been interpreted to include claims involving a "hostile environment." See, e.g., *Bowen v. Department of Human Services*, 606 A.2d 1051, 1053 (Me. 1992). Similarly, "hostile environment" claims have been extended to Title III of the Americans with Disabilities Act, which has similar wording to the public accommodations provision in the MHRA. See *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 314 (D. Mass. 1997). Compare 5 M.R.S.A. § 4592(1) with 42 U.S.C. § 12182(a). Accordingly, a hostile public accommodations environment claim will be recognized here, and the standards from the employment context will be adopted. Cf. *Guckenberger*, 957 F. Supp. at 314.
- 6) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive [public accommodations] environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile public accommodations environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an [individual's enjoyment of a place of public accommodation]." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the [place of public accommodations] to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.
- 7) To establish liability on the part of the place of public accommodation for a hostile environment created by one of its employees, Complainant must

demonstrate that the place of public accommodation "knew or should have known of the charged [unlawful] harassment and failed to implement prompt and appropriate action." *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002).

- 8) Here, Complainant has demonstrated that Respondent Cadman subjected Complainant to a hostile public accommodations environment on the basis of race, ancestry, and national origin, and Respondent DHHS is also liable, with reasoning as follows:
- a) Respondent's written information states that Ms. Cadman stated that it was her understanding that Native American families look out for one another, stick together and do not "tell" on each other. Ms. Cadman asked the Complainant whether this was true. Respondent's further information states that the Complainant interpreted Ms. Cadman's remark as suggesting that Native American's "lie" for each other. Respondent's information states that Ms. Cadman did not state that Native Americans "lie" for each other and did not intend her comment to be racially disparaging. Even if one accepted Respondent's version of the comments as the truth, that Ms. Cadman did not out-and-out call Ms. Hustus or other Natives "liars," it was certainly strongly implied. It is difficult to see how Ms. Cadman could have interpreted these comments any other way than what she did even if the comments were made as Respondent states.
 - b) However, since Complainant submitted a copy of her 12-page journal entry written on the day in question, it is credible that this was likely the correct scenario of events. Likewise, Complainant submitted a letter from a former case manager she had spoken to who verified that Complainant had contacted her around the time of these events and related the comments made by Ms. Cadman. This person indicated that Complainant was upset by the comments which Complainant described as "discriminatory." Since the former case manager has nothing to gain by providing this testimony, it is deemed to be credible.
 - c) Complainant's version is that Ms. Cadman's comments included that "I have the understanding that you Natives don't rat on each other and that you guys lie for each other," and that "those people up there (on the Island) cover up for each other all the time." When she told Ms. Cadman that these people were her tribe but she did not know anyone up there (on the island) as she was not raised there. Ms. Cadman accused her of lying and said she was born and raised on the island.
 - d) It is found that these comments, made by a DHHS caseworker investigating an allegation of abuse and neglect by Complainant of her

children, created an objectively and subjectively abusive public accommodations environment. *See Nadeau*, 675 A.2d at 976.

- e) Ms. Hustus was treated differently than other individuals being investigated. It is assumed that Ms. Cadman would not make comments to a Caucasian person she was investigating that she "had the understanding that you Caucasians don't rat on each other and that you guys lie for each other."
- f) Although Complainant states that she does not know whether Supervisor overheard the comments, DHHS has not denied that Supervisor did overhear them.
- g) DHHS has stated that Complainant never made a complaint directly to them about Ms. Cadman's alleged comments. It is unlikely that a person who is in the midst of being investigated by the State for complaints regarding her children would feel they were in a position to make a complaint against their case worker. Complainant indicated that there was an on-going investigation by DHHS against her. As such, there would be a continuing need for Complainant to interact with Ms. Cadman. Since Ms. Cadman represented the State, it is unlikely that Complainant would have felt comfortable in reporting Ms. Cadman's comments to her superiors.
- h) There is no indication that Ms. Cadman was counseled or reprimanded in response to her alleged discriminatory comments.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Respondents, State of Maine, Department of Health and Human Services, and Janel Cadman, discriminated against Barbara Hustus because of her race, ancestry, and national origin.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. §4612(3).


Patricia E. Ryan, Executive Director


Sheila P. Pierce, Field Investigator